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IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Immigration Appeals found that petitioners, legal permanent residents of the United States, were deportable on the basis of their prior criminal convictions and were barred from applying for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) by a recent amendment to the Immigration and Nationality Act (INA). Petitioners filed petitions for review in the court of appeals seeking review of the Board's ruling on the ground that the amendment did not apply retroactively to their cases and that, if applicable, it would violate due process and equal protection. The court of appeals consolidated the three cases and dismissed all of petitioners' claims for lack of jurisdiction in light of 8 U.S.C. 1252(a)(2)(C), one of the permanent judicial review amendments to the INA enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The court of appeals held, however, that petitioners could obtain review of their claims in a district court habeas corpus action under 28 U.S.C. 2241. The questions presented are:

1. Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction on direct petition for review over petitioners' statutory and constitutional challenges to their final removal orders, but that the district courts had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

2. Whether IIRIRA's amendments to the Immigration and Nationality Act violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment if they preclude all review of petitioners' constitutional or statutory claims?

PARTIES TO THE PROCEEDINGS

Petitioners are Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan.

Respondent is the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The consolidated opinion of the court of appeals (Pet. App. 1a[1]) is not yet reported. The decision and order of the immigration judge (Pet. App. 34a), and the decision of the Board of Immigration Appeals (Pet. App. 37a), are unreported in *Calcano-Martinez*. The decision and order of the immigration judge (Pet. App. 40a, 43a), and the decision of the Board of Immigration Appeals (Pet. App. 48a), are unreported in *Madrid*. The decision and order of the immigration judge (Pet. App. 50a), and the decision of the Board of Immigration Appeals (Pet. App. 66a), are unreported in *Khan*.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (Pet. App. 75a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, U.S. Const., Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; Article III of the United States Constitution; 8 U.S.C. 1182(c), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a)(1), (a)(2)(C), and (b)(9) (Supp. V 1999); Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546; and 28 U.S.C. 2241.

STATEMENT

Petitioners respectfully request that this petition be considered in conjunction with the Solicitor General's petition for certiorari in *INS v. St. Cyr*, No. 00-767 (filed November 13, 2000). *St. Cyr* and the instant case were companion cases in the Second Circuit, were argued before the same panel and decided on the same day (in separate opinions), and involve the same jurisdictional amendments to the Immigration and Nationality Act (INA).

As explained more fully below, petitioners do not object to the Second Circuit's holding in this case that the recent jurisdictional amendments to the INA preclude review of their constitutional and statutory claims by means of a petition for review in the court of appeals, *provided that*, as the court of appeals also held, they are entitled to pursue those claims in a district court habeas corpus action under 28 U.S.C. 2241 (the general federal habeas corpus statute). However, if the Court concludes that the jurisdictional issues raised by this case and *St. Cyr* warrant review, petitioners respectfully submit

that the instant case provides the better vehicle to address those issues because the petitioners in this case all filed petitions for review in the court of appeals *and* district court habeas actions, while the alien in *St. Cyr* filed only a habeas action. Accordingly, if the Court concludes that review is warranted, petitioners respectfully request that the Court grant certiorari in this case and hold the petition in *St. Cyr* or, alternatively, grant certiorari in both cases on the jurisdictional issues.[2]

A. Introduction

1. This case raises questions concerning the right of longtime legal permanent resident immigrants to obtain judicial review of a final order of removal in light of the permanent jurisdictional amendments to the Immigration and Nationality Act (INA). Those amendments were enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546.

Petitioners assert that IIRIRA's jurisdictional amendments do not preclude review of their challenges to their final removal orders, and that if they do preclude review of their claims, they violate the Suspension of Habeas Corpus Clause, Article III, and due process. The government contends that Congress has dictated that *no* court may hear their challenges because of the nature of the claims. The government further contends that the complete preclusion of review over petitioners' claims raises no constitutional concerns.

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[2] The government's petition in *St. Cyr* also seeks review of the Second Circuit's merits ruling in that case. Petitioners in this case raised the same or similar statutory and constitutional claims as those raised in *St. Cyr*, but the Second Circuit did not reach the merits in this case. Accordingly, this petition addresses only the jurisdictional question decided by the Second Circuit.

More specifically, the jurisdictional issue raised in this case is whether immigrants with certain criminal convictions may judicially challenge the Board of Immigration Appeals' ruling that they are statutorily ineligible to apply for a discretionary waiver of deportation. That issue raises the questions (1) whether the proper *forum* to raise this type of challenge is in the court of appeals by means of a petition for review or in the district court by means of a habeas corpus action, and (2) whether irrespective of the forum for review, the *scope* of jurisdiction is limited to reviewing only substantial constitutional claims, so that all non-constitutional errors (including errors of statutory construction, such as the statutory retroactivity claims advanced by petitioners in this case) are wholly unreviewable.

The three petitioners in this case are all lawful permanent residents of the United States who are subject to administratively final orders of removal (formerly called orders of deportation). The Board of Immigration Appeals (BIA or Board) determined that they were deportable based on their past criminal convictions and further held that a substantive amendment enacted by IIRIRA rendered them statutorily ineligible to apply for a discretionary waiver of deportation. Each petitioner sought review by filing both a district court habeas action under, *inter alia*, 28 U.S.C. 2241, and a petition for review in the Second Circuit pursuant to 8 U.S.C. 1252(a)(1), which provides a general grant of jurisdiction to the courts of appeals to review challenges to final orders of removal by means of a petition for review. Petitioners did not contest the BIA's determination that they were deportable in light of their prior criminal convictions. Rather, they challenged on statutory and constitutional grounds the BIA's determination that they were ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c) (1994) (granting Attorney General discretionary author-

ity to waive deportation of longtime lawful permanent residents who satisfy statutory eligibility criteria). Petitioners' principal contention is a statutory retroactivity claim—that the BIA misinterpreted the temporal reach of the substantive amendments restricting or eliminating eligibility for Section 1182(c) relief and that Congress did not intend those amendments to apply retroactively to cases where, as here, the relevant criminal conduct triggering deportation occurred before passage of the amendments.

The government took the position in the court of appeals that Congress has eliminated district court habeas jurisdiction over final removal orders and placed all review of such orders exclusively in the court of appeals by petition for review. The government further contended that in light of 8 U.S.C. 1252(a)(2)(C), one of the jurisdictional provisions added to the INA by IIRIRA, the scope of review in the court of appeals was severely restricted in cases where, as here, the alien is deportable on the basis of one of the offenses enumerated in Section 1252(a)(2)(C). Section 1252(a)(2)(C) provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [various sections of the INA]." In light of IIRIRA's amendments, the government maintained that (1) jurisdiction in the court of appeals regarding eligibility for a discretionary waiver is limited to "substantial constitutional" claims and that petitioners presented no such claims, (2) non-constitutional claims regarding eligibility for a waiver cannot be heard in *any* court (district court or the court of appeals), and (3) the complete elimination of a judicial forum for petitioners' statutory retroactivity claims raises no constitutional concerns. Accordingly, the government argued that the petitions for review should be dismissed for lack of juris-

diction and that no court had jurisdiction over petitioners' claims.

Petitioners, in contrast, took the position that review over both their constitutional and statutory claims remained available and that IIRIRA would violate the Constitution if it did not permit review in *some* court over both their constitutional and statutory claims. Petitioners noted that Congress was constitutionally free to authorize review either by petition for review in the court of appeals or by habeas corpus in district court, but maintained that in light of prior Second Circuit precedent construing the structurally similar jurisdictional amendments made by IIRIRA's *transitional* rules, the proper mechanism for review of their claims was, as a matter of statutory construction, in the district court by means of a habeas corpus action.

The court of appeals noted that each petitioner was deportable on the basis of a criminal offense enumerated in 8 U.S.C. 1252(a)(2)(C) and held that Section 1252(a)(2)(C) repealed the circuit court's own petition-for-review jurisdiction over petitioners' statutory and constitutional claims regarding their eligibility to apply for a Section 1182(c) waiver of deportation. But the court of appeals held that petitioners could bring their claims in a district court habeas action under 28 U.S.C. 2241 because no provision of IIRIRA expressly repealed that grant of jurisdiction. The court of appeals further held that the scope of review in a Section 2241 habeas action included both constitutional and statutory claims. Accordingly, it dismissed the petitions for review for lack of jurisdiction without reaching the merits and held that petitioners could pursue their constitutional and statutory claims in a district court habeas action.

Because the court of appeals concluded that the district courts retain habeas jurisdiction to review petitioners'

constitutional and statutory claims, it held that the elimination of its own petition-for-review jurisdiction over petitioners' claims did not raise the "profound constitutional questions" that would have been triggered had no forum been available to raise pure questions of constitutional or statutory law regarding eligibility for a waiver of deportation. Pet. App. 31a. The court stressed that absent the alternative avenue of district court habeas review, it could not have dismissed the petitions for review without first addressing whether petitioners' constitutional or statutory claims could be completely insulated from review in any court by any means. *Id.*

As discussed more fully below, all three petitioners had previously filed district court habeas actions, but none had been adjudicated by the district court at the time of the Second Circuit's decision on the petitions for review. In two of the cases, the district court dismissed the habeas petitions without prejudice to refiling depending upon the Second Circuit's ruling on the petitions for review; to date neither has been reinstated. In the other case, the habeas petition was held in abeyance and remains pending before the district court.

2. Because the court of appeals preserved habeas jurisdiction over petitioners' constitutional and statutory claims, they do not object to the dismissal of their petitions for review. However, the government has now filed a certiorari petition in *St. Cyr* requesting that the Court review the Second Circuit's interpretation of IIRIRA's jurisdictional amendments on the ground that the Second Circuit erred in finding habeas jurisdiction (as well as the Second Circuit's merits ruling, if the Court concludes that jurisdiction exists). *INS v. St. Cyr*, No. 00-767 (filed November 13, 2000). If the Court determines that the Second Circuit's interpretation of IIRIRA's jurisdictional amendments warrants review, petitioners submit that the

instant case provides a better vehicle for doing so because petitioners filed both petitions for review and habeas corpus actions. Accordingly, if the Court determines that review is warranted, petitioners respectfully request that the Court grant this petition and hold the petition in *St. Cyr* or, alternatively, grant the petitions in both cases on the jurisdictional issues.

B. Statutory Framework

IIRIRA was enacted on September 30, 1996, and revised both the substantive and jurisdictional provisions of the INA. The jurisdictional amendments of IIRIRA that are at issue here are the *permanent* provisions codified at 8 U.S.C. 1252 *et seq*. They apply to all cases in which the administrative immigration "removal" proceedings commenced on or after April 1, 1997. *See* IIRIRA § 309(a), 110 Stat. 3009-625.

The jurisdictional issue presented by this case initially arose, however, under two prior sets of amendments to the INA enacted by Congress in 1996. The first set was enacted on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. The second was the *transitional* rules enacted by IIRIRA. *See* IIRIRA § 309(c), 110 Stat. 3009-626. Although these prior jurisdictional amendments are not directly at issue here, the decisions from the courts of appeals construing the prior amendments have had a significant impact on the manner in which the circuits have interpreted the permanent jurisdictional amendments.

1. AEDPA and IIRIRA's Transitional Amendments

Historically, deportation orders were reviewable in district court, primarily through habeas corpus, and for a brief period, through both habeas and APA declaratory

actions. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955). In 1961, Congress amended the INA and created a new judicial review scheme, formerly codified at 8 U.S.C. 1105a *et seq.* (1994), INA § 106 *et seq.*

The 1961 amendments gave the courts of appeals "sole and exclusive" jurisdiction to review final deportation orders by means of a petition for review. *See* former 8 U.S.C. 1105a(a) (1994), INA § 106(a); *Foti v. INS*, 375 U.S. 217, 221 (1963). The 1961 amendments also contained a provision that expressly stated that habeas review of deportation orders remained available, 8 U.S.C. 1105a(a)(10), INA § 106(a)(10), although there was confusion regarding precisely when aliens could invoke such jurisdiction given that the 1961 amendments simultaneously vested the courts of appeals with "sole and exclusive" jurisdiction over final deportation orders. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290, 293 (9th Cir. 1995); *United States ex rel. Marcello v. INS*, 634 F.2d. 964, 969 (5th Cir. 1981).

AEDPA was enacted on April 24, 1996, and contained two relevant changes to the judicial review scheme created in 1961.[3] First, in Subtitle A of Title IV, AEDPA § 401(e) repealed the habeas provision in 8 U.S.C. 1105a(a)(10). 110 Stat. 1268. Second, in Subtitle B, AEDPA § 440(a) amended former 8 U.S.C. 1105a(a)(10) to provide that a final order of deportation entered against immigrants deportable on the basis of certain enumerated criminal offenses "shall not be subject to review by any court." 110 Stat. 1276-1277. AEDPA's amendments did not mention 28 U.S.C. 2241.

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[3] The courts of appeals held that AEDPA's jurisdictional provisions went into effect immediately and applied to all cases pending on the date of enactment. *See, e.g., Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996).

IIRIRA became law four months later and enacted additional changes to judicial review, including both transitional and permanent jurisdictional rules. The transitional rules applied to immigration proceedings commenced before April 1, 1997, in which the deportation order became administratively final on or after October 31, 1996. IIRIRA §§ 309(a), (c)(1), (c)(4). Like AEDPA, IIRIRA's transitional amendments contained a provision that restricted review in cases involving aliens deportable on the basis of certain criminal offenses. That provision, IIRIRA § 309(c)(4)(G), provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." 110 Stat. 3009-626. IIRIRA's transitional rules, like AEDPA's amendments, did not mention Section 2241 habeas jurisdiction.

The jurisdictional amendments enacted by AEDPA and IIRIRA's transitional rules resulted in a 10-1 division in the courts of appeals on the question of whether aliens who are deportable on the basis of a criminal offense enumerated in AEDPA § 440(a) or IIRIRA § 309(c)(4)(G) could obtain review of the BIA's determination that they are statutorily ineligible to apply for a waiver of deportation (the question at issue here under IIRIRA's permanent rules). The circuits overwhelmingly held that such challenges could no longer be brought in the courts of appeals by petition for review, that the proper forum to challenge a denial of a waiver of deportation was in a district court habeas action, and that the scope of habeas review included, at a minimum, constitutional and statutory claims. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483

(4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana-Pizano II*"); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). *But see LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S.Ct. 1157 (2000).

These courts concluded that the jurisdictional bar repealed their own petition-for-review jurisdiction over challenges to the denial of a waiver of deportation, including their jurisdiction to review constitutional claims, but held that nothing in AEDPA or IIRIRA's transitional rules precluded district court habeas jurisdiction over such challenges under 28 U.S.C. 2241. Applying this Court's decision in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), which declined to find a repeal "by implication" of the Court's original habeas jurisdiction under Section 2241, the circuits held that the absence of an express statement repealing Section 2241 meant that such jurisdiction remained available to review certain aspects of a deportation order that could not be challenged by a petition for review. The courts of appeals further held that the scope of habeas review was not limited to reviewing substantial constitutional claims but included review of at least certain non-constitutional *legal* claims (such as pure questions of statutory interpretation) because historically non-constitutional legal claims were reviewable in immigration habeas actions and the plain terms of Section 2241 authorized jurisdiction over violations of the "Constitution or treaties or *laws* of the United States." *See* Section 2241(c)(3) (emphasis added); *see also* Section 2241(c)(1).[4]

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[4] The lone dissenting circuit was the Seventh, but even it disagreed only in part with the majority approach. *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000). *LaGuerre*

Both the government and aliens sought review in this Court regarding the proper forum and scope of review to challenge the denial of a waiver of deportation. The government sought review in the first three decisions adverse to its jurisdictional position (the First Circuit's decision in *Goncalves*; the Second Circuit's decision in *Henderson/Navas*; and the Ninth Circuit's decision in *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998)("*Magana-Pizano I*"). The Court denied the petitions in *Goncalves* and *Henderson/Navas*, and remanded the Ninth Circuit's decision in *Magana-Pizano I* for further consideration in light of the Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). *See Reno v. Goncalves*, 526 U.S. 1004 (1999) (denying certiorari); *Reno v. Navas*, 526 U.S. 1004 (1999) (same); *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), *vacating* 152 F.3d 1213 (9th Cir. 1998).[5] *See also LaGuerre v. Reno*, 120 S. Ct. 1157 (2000) (denying alien's petition for certiorari).

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held that habeas jurisdiction was not available to challenge a final deportation order and that all review must be sought in the court of appeals by means of a petition for review. However, *LaGuerre* expressed skepticism (but ultimately did not rule) on the government's position that the *scope* of review was limited to constitutional challenges and that Congress had intended to foreclose all review of statutory claims challenging the denial of a waiver of deportation, including the statutory retroactivity claim at issue in that case: "It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." 164 F.3d at 1041.

[5] Unlike the decisions in the other circuits, the Ninth Circuit rested its decision on constitutional grounds because it found that Section 2241 had been repealed by one of IIRIRA's provisions, 8 U.S.C. 1252(g). The reach of that provision was significantly narrowed in *AADC*, 525 U.S. at 482, and on remand the Ninth Circuit joined nine other circuits in concluding that none of the applicable amendments repealed Section 2241, thereby obviating the need for a constitutional ruling. *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) ("*Magana-Pizano II*").

2. IIRIRA's Permanent Jurisdictional Amendments

The permanent IIRIRA amendments repealed the prior judicial review scheme (*i.e.*, the 1961 scheme as amended by AEDPA and IIRIRA's transitional rules) and substituted a new statute, codified at 8 U.S.C. 1252 *et seq.* Although the relevant permanent amendments are worded differently, the basic structure of the new provisions is the same. The permanent jurisdictional rules enacted by IIRIRA contain provisions vesting the courts of appeals with sole jurisdiction to review removal orders by petition for review (*see* 8 U.S.C. 1252(a)(1); 1252(b)(9)) and, as noted, include a provision restricting review for aliens removable on the basis of specified criminal offenses, codified at 8 U.S.C. 1252(a)(2)(C). Like the prior sets of amendments, the permanent IIRIRA amendments do not mention Section 2241 habeas jurisdiction.

As with the prior amendments, IIRIRA's permanent jurisdictional amendments have resulted in litigation regarding the availability of judicial review over challenges to the denial of a waiver of deportation. Four circuits, including the court below, have held that aliens may not challenge the denial of a waiver in the courts of appeals by means of a petition for review, but may bring both constitutional and statutory challenges to the denial of a waiver in a Section 2241 habeas action in district court. *See* Pet. App. 1a (opinion below); *Mahadeo v. Reno*, 226 F.3d 3, 13 (1st Cir. 2000), *petition for certiorari pending*, No. 00-962; *Liang v. INS*, 206 F.3d 308, 317-23 (3d Cir. 2000), *petition for certiorari pending sub nom. Rodriguez v. INS*, No. 00-753; *Flores-Miramontes v. INS*, 212 F.3d 1133, 1137 (9th Cir. 2000); *Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

Three Circuits (the Fifth, Seventh and Eleventh) have stated that there is generally no longer any habeas jurisdiction over final orders and that any review that remains for aliens removable on the basis of a criminal conviction enumerated in Section 1252(a)(2)(C) must be sought in the court of appeals by a petition for review. These courts have acknowledged that the permanent rules, like the prior amendments, nowhere mention Section 2241, but have concluded that the language and overall structure of the permanent amendments are sufficient to repeal habeas jurisdiction. *Max-George v. Reno*, 205 F.3d 194, 198 (5th Cir. 2000) (challenge to threshold finding of deportability, not denial of waiver), *petition for certiorari pending*, No. 00-6280; *Morales-Ramirez v. Reno*, 209 F.3d 977, 980 (7th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) ("*Richardson II*") (challenge to detention, not final order), *cert. denied*, 120 S.Ct. 1529 (2000).

C. Petitioners' Administrative Immigration Proceedings

1. Deboris Calcano-Martinez was admitted to the United States as a lawful permanent resident in 1971 at the age of three. Pet. App. 5a. She has four children who are United States citizens. *Id.* On April 24, 1996, petitioner pled guilty in New York state court to the offense of attempted criminal sale of a controlled substance in the third degree. She received a sentence of 1-3 years. Pet. App. 5a-6a.

Based on her criminal conviction, the Immigration and Naturalization Service (INS) instituted removal proceedings against petitioner in June 1997, charging that her criminal conviction rendered her deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense). In July 1997, an immigration judge determined that petitioner was deportable as charged and also held that she was

statutorily ineligible to apply for a waiver of deportation under former 8 U.S.C. 1182(c), INA § 212(c), on the ground that IIRIRA had repealed Section 1182(c) as of April 1, 1997.[6]

The BIA affirmed on December 30, 1997, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA. Pet. App. 37a-39a. The BIA's decision was based on IIRIRA § 304(b), 110 Stat. 3009-597, one of the permanent IIRIRA substantive amendments. Pet. App. 38a. In light of IIRIRA § 304(b), which repealed 8 U.S.C. 1182(c) (INA § 212(c)) as of April 1, 1997 (IIRIRA's general effective date), the BIA reasoned that a waiver under former Section 1182(c) was not a form of relief that is available to aliens, like petitioner, whose immigration proceedings commenced on or after April 1, 1997.

2. Sergio Madrid became a lawful permanent resident of the United States on December 20, 1989, at the age of seventeen. Pet. App. 7a. In September 1994, he was convicted in New York state court for the offense of criminal sale of a controlled substance in the second degree. He received an indeterminate sentence of four years to life

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[6] Former Section 1182(c) authorized the Attorney General (or her delegates—immigration judges and the BIA) to waive deportation for longtime lawful permanent residents who satisfied the statutory eligibility criteria. Prior to the 1996 amendments, lawful permanent residents were statutorily eligible to apply for a Section 1182(c) waiver if they had a lawful unrelinquished domicile in this country for seven years, and, if convicted of an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c) (1994). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). The request for Section 1182(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 1182(c) application was adjudicated.

imprisonment, but was released after approximately four years. Pet. App. 7a.

Based on his criminal conviction, the INS instituted removal proceedings against him in June 1997. Petitioner conceded that his criminal conviction rendered him deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony) and 1227(a)(2)(B)(i) (controlled substance offense), but sought to apply for a Section 1182(c) waiver of deportation. Pet. App. 45a. In October 1997, an immigration judge determined that petitioner was statutorily ineligible for Section 1182(c) relief in light of IIRIRA, denied the request for a waiver as a matter of law, and ordered him removed from the United States. Pet. App.40a, 43a. The BIA affirmed on May 5, 1998, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA's repeal of that section. Pet. App. 45a-47a.

3. Fazila Khan was admitted to the United States as a lawful permanent resident in September 1987. Pet. App. 7a-8a. She has a four-year-old daughter who is a United States citizen. Khan's mother and sister are also United States citizens, as are five of her aunts and uncles. Pet. App. 8a. In November 1996, petitioner pled guilty to a controlled substance offense committed in March 1996, for which she received a four-month sentence followed by a one-year period of supervised release. Pet. App. 8a, 59a.

Based on her criminal conviction, the INS instituted removal proceedings against petitioner in May 1997, charging that she was deportable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). She conceded that she was deportable in light of her criminal conviction, but sought to apply for a Section 1182(c) waiver. In July 1997, an immigration judge determined that she was statutorily ineligible for Section 1182(c) relief in light of IIRIRA. Pet. App. 60a. The BIA affirmed on May 28,

1997, agreeing that petitioner was statutorily ineligible to apply for Section 1182(c) relief in light of IIRIRA. Pet. App. 72a-73a.

D. Decision of the Court of Appeals

All three petitioners filed petitions for review in the court of appeals seeking review of the BIA's ruling on two main grounds. The first is a statutory claim: that IIRIRA's repeal of the INA's former Section 1182(c) waiver provision does not apply retroactively to cases where the relevant criminal conduct triggering deportation occurred before passage of the 1996 amendments. The second is a constitutional claim: that the retroactive repeal of Section 1182(c) relief under the circumstances here would be arbitrary and irrational in violation of due process and equal protection. Because of the jurisdictional controversy surrounding the 1996 amendments, all three petitioners also filed district court habeas corpus actions raising the same statutory and constitutional claims, which the district courts have declined to adjudicate pending a final disposition on the petitions for review.

The court of appeals consolidated the three petitions for review for purposes of argument and ruling and issued a consolidated decision on September 1, 2000. In light of the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C), the court of appeals held that it could not entertain petitioners' constitutional or statutory claims challenging the denial of a Section 1182(c) waiver because the jurisdictional bar in Section 1252(a)(2)(C) repealed the court's petition-for-review jurisdiction over such challenges. The court stated that it was unnecessary for it to create exceptions to the jurisdictional bar because the permanent rules left open district court habeas review under 28 U.S.C. 2241 as an adequate alternative avenue of review. By finding that habeas jurisdiction remained available to challenge the denial of Section 1182(c) relief, the court avoided the

"profound constitutional questions" that would have been triggered by a repeal of habeas corpus in the absence of some other avenue of review over petitioners' constitutional and statutory claims. Pet. App. 31a.

The court of appeals' conclusion that Section 2241 habeas review remained available was based on its prior decisions interpreting the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The court of appeals stated that under those decisions Section 2241 could only be repealed by an express directive. Noting that none of the permanent provisions mentioned Section 2241, the Court held that the amendments did not repeal that grant of jurisdiction. Pet. App. 22a-23a. The court of appeals thus held that Section 2241 jurisdiction remains available and instructed petitioners that they could pursue their claims by means of their previously-filed habeas actions.[7]

E. The *St. Cyr* Decision

St. Cyr and the instant case were argued before the same panel and decided on the same day. *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000). Like the petitioners in this case, the BIA found that the alien in *St. Cyr* was deportable on the basis of a pre-1996 criminal offense and that he was statutorily ineligible to apply for a Section 1182(c) waiver in light of IIRIRA's repeal of that form of

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[7] All three habeas petitions were filed in October 1999. In *Khan*, the habeas action was held in abeyance and remains pending. Pet. App. 8a. In the other two cases (*Calcano-Martinez* and *Madrid*), a stipulation and order was entered in December 1999 dismissing the habeas petition without prejudice to refiling depending upon the Second Circuit's disposition of the petitions for review. Pet. App. 6a-7a. The agreement provided that any refiling of the habeas petition would await issuance of the mandate by the Second Circuit, which has not yet issued because the government has moved to stay the mandate pending this Court's disposition of *St. Cyr*. The motion is currently before the court of appeals.

relief as of April 1, 1997. And, as in this case, the alien in *St. Cyr* challenged the BIA's Section 1182(c) ruling on both statutory retroactivity and constitutional due process grounds. Unlike the petitioners in this case, the alien in *St. Cyr* filed a district court habeas action but not a petition for review in the court of appeals.

The Second Circuit's *St. Cyr* decision held that the district court had habeas jurisdiction over the alien's claims and, on the merits, that the BIA erred in finding that the alien was statutorily ineligible to apply for a Section 1182(c) waiver. The court's jurisdictional discussion was brief and simply noted that the jurisdictional issue had been decided in *Calcano-Martinez. St. Cyr*, 229 F.3d at 409-10.

On the merits, the court concluded that the repeal of the INA's former Section 1182(c) waiver provision did not apply retroactively to cases where the alien's criminal conviction triggering deportation occurred by plea agreement prior to passage of the 1996 amendments, reasoning, *inter alia*, that aliens may have relied on the availability of Section 1182(c) relief when they agreed to plead guilty to an offense that would render them deportable. 229 F.3d at 417-21.

REASONS FOR GRANTING THE WRIT

The jurisdictional question decided by the court of appeals in this case was whether IIRIRA precluded *all* avenues of review over petitioners' statutory and constitutional claims, and if so, whether the *complete* preclusion of review is constitutional. The Second Circuit held that IIRIRA repeals the court of appeals' petition-for-review jurisdiction, but preserves habeas jurisdiction, and thus, does not foreclose all review. The Solicitor General's petition in *St. Cyr* urges the Court to grant certiorari to review the Second Circuit's conclusion that IIRIRA preserved

habeas jurisdiction over the types of claims raised in *St. Cyr* and this case. If the Court decides that the Second Circuit's interpretation of IIRIRA warrants review, petitioners submit that this case is a better vehicle than *St. Cyr* to undertake that review because the petitioners in this case filed petitions for review *and* district court habeas actions, whereas the alien in *St. Cyr* filed only a habeas action. Therefore, *St. Cyr* may raise issues that are ancillary to the central jurisdictional question decided by the court of appeals, *i.e.*, whether IIRIRA preserves *any* avenue of review.[8] Accordingly, if the Court decides that the jurisdictional issue warrants review, petitioners respectfully request that the Court grant this petition and hold the petition in *St. Cyr*. Alternatively, if the Court were to grant certiorari in *St. Cyr* on the jurisdictional question, petitioners respectfully request that the Court also grant this petition given the differing postures of the two cases.

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[8] The ancillary issues would arise if this Court were to hold that the statutory and constitutional claims raised in *St. Cyr* and this case are reviewable by petition for review and not by habeas corpus in the district court. Such a result would raise issues regarding whether an alien may now file a petition for review, or alternatively, may obtain habeas review even if there is *generally* no habeas jurisdiction available. These subordinate issues may turn significantly on the extent to which then-existing circuit precedent suggested that the filing of a petition for review would have been futile, thereby causing aliens to seek review only by means of a district court habeas action. *See, e.g.*, Pet. App. 29a (opinion below) (noting that Second Circuit's prior precedent construing AEDPA and IIRIRA's transitional rules foreclosed petition-for-review jurisdiction and stating that those decisions dictated the same result under the similar amendments made by IIRIRA's permanent rules); *Mahadeo*, *supra*, 226 F.3d at 8-14 (same); *Liang*, 206 F.3d at 322-23 (same).

This case presents a better jurisdictional vehicle because, as noted, the petitioners here all filed petitions for review and district court habeas actions. As the courts of appeals have recognized, the availability of habeas jurisdiction should not be assessed in isolation from the availability of petition-for-review jurisdiction. The proper interpretation and constitutionality of the recent jurisdictional amendments hinge critically on the interplay between petition-for-review and habeas corpus jurisdiction and the extent to which at least one of those avenues remains available.

Indeed, the Second Circuit in this case never suggested that petitioners could seek review in a district court habeas action irrespective of whether or not review was available in the court of appeals by means of a petition for review. The Second Circuit made clear that its conclusion that habeas review remains available could not be divorced from its holding that petitioners were precluded from obtaining review in the court of appeals by petition for review:

> Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional question that would arise if we concluded that all judicial review had been eradicated.

Pet. App. 31a. *See also id.* at 28a-29a (discussing prior Second Circuit precedent construing jurisdictional provisions of AEDPA and IIRIRA's transitional rules and not-

ing that because those provisions "eradicated all review [in the court of appeals] for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims remains").

The Second Circuit's analysis is consistent with the analysis in other circuits. As the Third Circuit stated in finding that habeas jurisdiction remains available under IIRIRA's permanent rules to review the identical types of statutory and constitutional claims advanced in this case, "determination of our jurisdiction over the petitions for review is inextricably intertwined with the question whether the district courts have continued habeas jurisdiction." *Liang*, 206 F.3d at 312. *See also Mahadeo*, 226 F.3d at 10 ("Our conclusion that IIRIRA does not repeal the availability of § 2241 relief in immigration cases also avoids the 'serious, novel, and complex' constitutional concerns raised by the elimination of aliens' historic access to general federal habeas corpus jurisdiction when *no other* judicial review remains") (emphasis added) (citations omitted).

Thus, as the courts of appeals have recognized, if constitutionally adequate review is available by petition for review, then access to habeas review is not necessary. Similarly, if constitutionally adequate review is available in the district court, then the lack of jurisdiction in the courts of appeals by petition for review is unproblematic. However, a profound constitutional issue would arise if IIRIRA's amendments were construed to preclude both avenues of jurisdiction over either constitutional or statutory challenges. Consequently, this Court must first determine as a matter of statutory interpretation whether IIRIRA has repealed review in both the district court and the court of appeals. That question of statutory interpretation is best presented in this case because petitioners filed petitions for review and district court habeas

actions, and thus, this case does not present the ancillary questions potentially presented by cases, such as *St. Cyr*, where the alien did not file a petition for review.

Although such ancillary issues are properly of concern in cases where the alien did not file a petition for review, they are subordinate issues that go beyond the central jurisdictional question decided by the Second Circuit in this case regarding whether *any* avenue of review remains available. If this Court were to grant certiorari and were to decide that the Second Circuit erred in finding habeas jurisdiction, those ancillary issues are appropriately decided by the courts of appeals in the first instance.

The government's *St. Cyr* petition does not contend that *St. Cyr* is a better or more complete vehicle than this case to decide the jurisdictional question. The government has taken the same jurisdictional position in both this case and *St. Cyr*: that (1) IIRIRA has eliminated all habeas jurisdiction over final removal orders and placed all review in the courts of appeals by means of a petition for review, (2) the scope of review in the courts of appeals is limited to correcting substantial constitutional errors regarding eligibility for a Section 1182(c) waiver and does not encompass any non-constitutional errors, (3) the aliens in this case and *St. Cyr* have not raised a "substantial" constitutional claim, and accordingly (4) the statutory and constitutional claims raised in this case and *St. Cyr* may not be heard in any court. Moreover, the government acknowledges that the exhaustive decision issued in this case is the Second Circuit's principal jurisdictional ruling but notes in its petition in *St. Cyr* (at 19 n. 13) that it was not in a position to seek certiorari in this case because it was "nominally" the prevailing party, *i.e.*, the Second Circuit dismissed the petitions for review as the government requested.

Rather, the government seeks certiorari in *St. Cyr* because it also presents the merits question decided by the Second Circuit. The presence of the merits question in *St. Cyr* does not, of course, affect the separate question of whether that case is the best vehicle to address the *jurisdictional* issue decided by the Second Circuit. If the Court concludes that the merits issue decided in *St. Cyr* warrants review, then that question should be separately briefed and argued in that case and the jurisdictional issues should be fully addressed in this case.

In sum, given that the decision in this case was the Second Circuit's principal jurisdictional ruling, that the government's jurisdictional contentions are identical in *St. Cyr* and this case, and that the alien in *St. Cyr* did not file a petition for review, this case is the better vehicle for the Court to address the Second Circuit's interpretation of IIRIRA's jurisdictional amendments (assuming the Court concludes that the issue warrants its attention in the first place). If, however, the Court were to decide to grant review on the jurisdictional question in *St. Cyr*, petitioners respectfully request that the Court also grant this petition.

CONCLUSION

For the foregoing reasons, if the Court decides that the jurisdictional issues raised in this case and *St.Cyr* warrant review, petitioners respectfully request that the Court either (1) grant this petition and hold the petition in *St. Cyr* pending disposition of the jurisdictional issues in this case, or (2) grant the petitions in this case and *St. Cyr*.

Respectfully Submitted,

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